Supreme Court, U.S.
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No. 99-1125

IN THE

Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

The Kansas Public Employees Retirement System, Inc. ("KPERS") respectfully submits this brief in reply to the two remaining briefs in opposition, those filed by respondents KPMG Peat Marwick LLP and Robert W.L. Spence ("KPMG Opp."), and by the Home Savings Association respondents, i.e., Sherman Dreiseszun, I.I. Ozar, and Thomas S. and Marilyn J. Morgan, co-executors of the Estate of Frank S. Morgan ("Dreiseszun Opp.").

KPERS has reached a settlement with the respondents that filed the other two opposition briefs, Shook Hardy & Bacon, and Blackwell Sanders Matheny Weary & Lombardi, L.L.P. The parties have filed with the Clerk agreed motions to dismiss the petition for certiorari as moot with respect to these respondents. Two respondents still in the case have not filed opposition briefs: Reimer & Koger Associates, Inc., and Kenneth H. Koger.

RESTATEMENT OF THE CASE

KPMG, and to a lesser extent the Home Savings Association respondents, hinge much of their opposition to certiorari on the claim that KPERS' statement of the case is materially inaccurate. Although many of the facts discussed by respondents are not relevant to the issues on which certiorari is being sought, KPERS is obliged to provide a response on these points. KPERS then answers the relatively limited attack that respondents concerning the reasons for granting the writ.

*1. **The portrayal of KPERS as an "innocent victim."*** KPMG asserts that the petition "grossly mischaracterizes" KPERS' status, supposedly portraying KPERS "as an innocent victim working always in good faith to obtain a definitive ruling on the applicable statute of limitations from the Kansas state courts." KPMG Opp. at 3. "In reality," KPMG argues, the Eighth Circuit held that KPERS "engaged in numerous abusive and manipulative litigation tactics. *Id.* at 3-4 (setting forth citations). The petition did not ignore these criticisms of KPERS. It specifically cited the portions of the decisions below

discussing these findings. Pet. at 16.[1]

KPERS does not deny that the district court and the Eighth Circuit have taken a dim view of the efforts of this agency of the State of Kansas to ensure that its claims against respondents, all arising under Kansas law, are adjudicated in the state courts of Kansas, not in Missouri federal court. Despite KPERS'

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[1] KPMG singles out two items in accusing KPERS of abusive litigation tactics. First, in the state-court litigation in Kansas in 1992, after respondents filed meritless third-party claims against the Resolution Trust Corporation (RTC) in an effort to obtain a federal forum, *see* Pet. at 6 n.4, KPERS won an order from the state trial judge severing the third-party claims, in an effort to protect its right to litigate the State's own claims arising under its own law in its own courts — while leaving undisturbed the right of the RTC to remove the spurious claims that had been made against it. KPMG describes this effort as "highly irregular," and cites the Eighth Circuit decision rejecting it. KPMG Opp. at 3 (citing *KPERS I*, 4 F.3d at 619); *see also* Dreiseszun Opp. at 4. But the petition specifically cited the passage in the Eighth Circuit decision below that relied in part on this same holding in *KPERS I*. Pet. at 16 (citing Pet. App. 6a (in turn citing *KPERS I* on the fact that "KPERS obtained an ex parte severance from the Kansas state court in order to frustrate removal")).

Second, in 1995 KPERS filed a motion to recuse the district court judge based on the cumulative impact of three conflicts: (a) the judge was an investor in the parent company of a bank that was a party in related litigation, which might be favorably impacted by rulings against KPERS; (b) the judge was the primary beneficiary of his mother's estate, which was currently being represented by one defendant in this case (Blackwell Sanders); and (c) the judge's daughter had just accepted a position as an associate with another defendant in the case (Shook, Hardy & Bacon) that could be severely damaged by adverse rulings by the judge. The judge declined to recuse himself, and the Eighth Circuit affirmed. *See In re KPERS*, 85 F.3d 1353 (8th Cir. 1996). The Eighth Circuit's decision, and the fact that the district court relied on it in denying KPERS Rule 60(b) relief, were noted in the petition. *See* Pet. at 16 (citing Pet. App. 11a (in turn citing *In re KPERS*, 85 F.3d at 1359-60)).

Respondents suggest without elaboration that the fact that the Eighth Circuit has entertained ten appeals in this case (some brought by various defendants), and that KPERS has filed four previous petitions for certiorari, means that KPERS has engaged in duplicative appellate litigation. KPMG Opp. at 2; Dreiseszun Opp. at 2. To the contrary, each appeal, and each prior petition for certiorari, raised quite distinct issues. Never have respondents sought sanctions on the theory that any of KPERS' appellate points have been duplicative of earlier appellate stages.

forthright admission that it filed its parallel litigation in Kansas state court in an effort to overcome what it viewed (correctly, as it turned out) as an erroneous statute-of-limitations ruling, *see* Pet. at 8-9, KPERS was sanctioned for these efforts. KPMG Opp. at 3-4; Dreiseszun Opp. at 6-7. These efforts were later held against KPERS when it sought Rule 60(b) relief at the end of the case. *See* Pet. at 15-16. The question presented is whether it is *permissible* to penalize a sovereign State for its efforts to litigate its own claims in its own courts — not whether KPERS can show that it was an "innocent victim" in every particular.

2. ***The suggestion that KPERS is arguing that this case is not properly in federal court.*** KPMG argues that KPERS "repeatedly complains that this case is not properly in federal court." KPMG Opp. at 4-5. That is not KPERS' argument. The petition does describe the manner in which the case was removed to federal court after the defendants sustained a loss on the statute-of-limitations issue — and in particular how the assertion of meritless third-party claims against the RTC provided the sole basis for removal. *See* Pet. at 5-6 & n.4. But this is not argued as an independent ground for certiorari; instead, it provides the context for KPERS' later efforts to pursue parallel litigation in the Kansas state courts as the only available means of obtaining an authoritative statute-of-limitations ruling. *See* Pet. at 8-9.[2]

3. ***The nature of the claims against respondents.*** KPMG notes that the only claims brought against it by KPERS sound in

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[2] KPMG states that KPERS' "representation that, after the claims against it were dismissed, the RTC had 'informed the district court that it had no further interest in the case remaining in federal court' (Pet. 6 n.4) is grossly misleading." KPMG Opp. at 4 n.1. We are unable to follow this point. The quotation that KPMG attributes to KPERS appears nowhere in Pet. at 6 n.4. That footnote accurately quotes the statement of the RTC's counsel, made in open court, setting forth the RTC's assumption that after it won dismissal the case would go back to state court, as the only reason the RTC had removed the case was to litigate its motion to dismiss in federal court. In the end, KPMG does not dispute that after winning dismissal the RTC (as made clear by the quoted statement of its counsel) took the "position that there was no reason for the case to remain in federal court." Pet. at 6 n.4.

negligence, and suggests that the petition's characterization of the case is "false." KPMG Opp. at 5. KPMG is mistaken. The petition's thumbnail description of the case did not suggest that every respondent was sued for fraud. *See* Pet. at 2, 4, 21.

4. ***The holdings of the district court and the Eighth Circuit below.*** KPMG claims that the petition falsely represents that the district court denied KPERS' Rule 60(b) motion based "solely on petitioner's 'unclean hands.'" KPMG Opp. at 5. KPMG then summarizes all of the grounds set out by the district court in its decision. *Id.* at 5-7. But the petition nowhere suggested that the "unclean hands" theory was the *sole* ground of the district court's decision. The petition focused on this ground because it *was*, undoubtedly, the sole basis of the Eighth Circuit's *affirmance* of the district court, *see* Pet. at 16, and it is the Eighth Circuit's decision that is the subject of the petition — as of course it must be. Finally, KPMG suggests that the petition falsely represents that the Eighth Circuit made a "finding that 'existing federal appellate precedent, applied in light of five extraordinary factors present in this case, required granting the relief requested.'" KPMG Opp. at 7 (citing Pet. at 16); *see also* Dreiseszun Opp. at 13 & n.6. The petition stated only that the Eighth Circuit "did not dispute KPERS' showing that existing federal appellate precedent" required the granting of Rule 60(b) relief — and that the Eighth Circuit rested its affirmance solely on an "unclean hands" theory that withheld Rule 60(b) relief (in part) based on KPERS' earlier efforts to litigate the State's own claims, arising under its own law, in its own courts. Pet. at 16. These points are unchallenged. It is the propriety of a court resting on that theory that is the basis of the petition.

REASONS FOR GRANTING THE WRIT

KPERS set forth three reasons for granting the writ. First, the Eighth Circuit's approach to Rule 60(b) conflicts with the decisions of this Court and of the Second, Fourth, Fifth and D.C. Circuits, which emphasize that the Rule 60(b) equitable balancing weighs the general interest in finality against the

specific interest in the justice of the result in the particular case. *See* Pet. at 17-19. Here, respondents cite Fourth Circuit and Eleventh Circuit decisions that add an "unclean hands" analysis to the mix. KPMG Opp. at 9-11; Dreiseszun Opp. at 17-18. By illustrating that the Eighth Circuit is hardly alone in its approach to Rule 60(b), these cases simply bolster the argument for certiorari. Further, respondents cite no cases supporting the use of an "unclean hands" theory against a governmental agency such as KPERS (or even a private entity advancing important public purposes), a novel approach. *See Perma Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968); *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 752-54 (9th Cir. 1991); *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1546-47 (E.D. Cal. 1992). Nor do they cite authority for using an "unclean hands" analysis to penalize a litigant for earlier, unrelated conduct; there is none. *See Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703, 717-18 n.14 (1974); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933); *American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 601 (7th Cir. 1985) (Posner, J.).

Second, the Eighth Circuit's approach to Rule 60(b) penalizes litigants who seek to defend their forum choice and to obtain authoritative rulings on state-law issues — thereby denying Rule 60(b) relief based on the very actions that may be required to qualify for such relief in the first place. *See* Pet. at 19-20. Respondents offer no defense of this approach.

Third, at minimum certiorari should be granted to reverse the affront to vital principles of federalism posed by the Eighth Circuit's holding that a sovereign State may be regarded as having "unclean hands" based (in part) on its efforts to litigate its own claims, arising under its own law, in its own courts. *See* Pet. at 21-23. Respondents do not defend this holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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